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No. 06-657

In the Supreme Court of the United States

RENT-A-CENTER, INC.,

Petitioner,

v.

HILDA PEREZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Court has jurisdiction under 28 U.S.C. § 1257(a) to review the New Jersey Supreme Court's interlocutory decision below vacating a judgment for Petitioner Rent-A-Center on purely state-law grounds, ordering reinstatement of Respondent Perez's state-law claims, and remanding for further proceedings on the merits in the state trial court, where Rent-A-Center has moved for summary judgment on state-law grounds.

(2) Whether Rent-A-Center preserved its federal due process argument raised here when the state courts below never addressed the argument and when Rent-A-Center made no argument based on federal law in its state-court briefing prior to its petition for rehearing in the New Jersey Supreme Court.

(3) Whether the decision below violated Rent-A-Center's right to fair warning under the Fourteenth Amendment's Due Process Clause when it construed state consumer protection statutes exactly as every lower state court did in previous cases, including several where Rent-A-Center was a losing party and chose to settle rather than appeal.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The New Jersey Supreme Court issued its decision on March 15, 2006. The decision reversed a lower court judgment for Petitioner Rent-A-Center and then remanded the case to the state trial court "for reinstatement of [Respondent Hilda] Perez's complaint and for such further proceedings as are warranted." 38a. On remand, Rent-A-Center has moved for summary judgment on state-law grounds. That motion is pending. Since there is no final state court judgment or decree for any party, and the parties are now litigating Perez's state-law claims in the state trial court, this Court lacks jurisdiction under 28 U.S.C. § 1257(a). Moreover, the New Jersey Supreme Court addressed no federal law question because none was raised until Rent-A-Center petitioned for rehearing in that court. The decision below thus does not draw into question any matter of federal law. Accordingly, the Court lacks jurisdiction under § 1257(a) to review this interlocutory state court decision addressing only matters of state law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New Jersey's Retail Installment Sales Act provides in relevant part:

> "Retail installment contract" means any contract . . . entered into in this State between a retail seller and a retail buyer evidencing an agreement to pay the retail purchase price of goods or services, which are primarily for personal, family or household purposes,

> or any part thereof, in two or more installments over a period of time. This term includes *a security agreement, chattel mortgage, conditional sales contract, or any other similar instrument* and any contract for the bailment or leasing of goods by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to or in excess of the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full compliance with the terms of such retail installment contract.

N.J. STAT. ANN. § 17:16C-1(b) (emphasis added to language omitted from Rent-A-Center's petition).

> A retail seller . . ., under the provisions of this act, shall have authority to charge, contract for, receive or collect a time price differential as defined in this act, on any retail installment contract evidencing the sale of goods or services in an amount or amounts as agreed to by the retail seller . . . and the buyer . . . on all . . . goods and services.
>
> *The retail installment contract may provide for an increase, or may provide for a decrease, or both, in the time price differential applicable to the contract. No increase during the entire loan term shall result in an interest rate of more than 6% per annum over the rate applicable initially, nor shall the rate be raised more than 3% per annum during any 12-month period. The lender shall not be obligated to decrease*

> *the interest rate more than 6% over the term of the loan, nor more than 3% per annum during any 12-month period. . . .*

N.J. STAT. ANN. § 17:16C-41 (emphasis added to language omitted from Rent-A-Center's Petition).

New Jersey's criminal usury statute provides in relevant part:

> *[N]otwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction*, any loan or forbearance with an interest rate which exceeds 30% per annum shall not be a rate authorized or permitted by law . . .

N.J. STAT. ANN. § 2C:21-19 (emphasis added to language omitted from Rent-A-Center's petition).

INTRODUCTION

This case presents an interlocutory decision by a state's highest court that construed state statutes and then remanded for proceedings on the merits of the plaintiff's state-law claims. The Supreme Court of New Jersey held that Rent-A-Center's "rent-to-own" contracts with consumers for the installment purchase of household goods were covered by New Jersey's Retail Installment Sales Act ("RISA") and its 30% ceiling on interest. In so ruling, the court entered no judgment for any party. Nor did it address any federal law question since none was raised until Rent-A-Center petitioned the court for

rehearing. Accordingly, this Court should not grant review to address Rent-A-Center's belated federal due process claim here because (1) the Court lacks jurisdiction to review this interlocutory state court decision; (2) the federal-law claim is waived; and, (3) in any event, the decision below implicates no factually supported federal law question.

Rent-A-Center's claim that the decision below applying RISA and its incorporation of the state's usury ceiling to rent-to-own sales was so unforeseeable as to violate its due process right to fair notice is wholly unfounded. At the time this case was filed in 2002:

- Every New Jersey court that faced claims like Perez's here had ruled, as the New Jersey Supreme Court did below, that rent-to-own contracts are installment sales covered by RISA and/or that such sales are covered by the state's criminal usury ceiling;

- two New Jersey courts had entered summary judgment *against Rent-A-Center itself* or companies it owned on one or both of these issues, whereupon Rent-A-Center settled those cases instead of appealing the adverse judgments it received; and

- *no New Jersey court* had ever held that rent-to-own contracts were exempt from RISA, or that RISA did not cap interest rates, despite Rent-A-Center's contention that this was the settled law.

Viewed against this backdrop, Rent-A-Center's claim of a due process violation for lack of fair warning shows an ostrich-like

pretense. Decades of New Jersey law and Rent-A-Center's own litigation history belie the company's assertion that the decision below enacted a "sea change" by "announcing new and unforeseeable state-law rules." Pet. at i.

To the contrary, Rent-A-Center made a conscious business decision to continue charging New Jersey customers exorbitant interest rates after having multiple state courts hold these charges unlawful, and after paying significant sums to settle those cases. In light of this state-law backdrop, Rent-A-Center's claim of a lack of fair warning creating a due process violation is unfounded and implausible at best.

If applied to these facts, Rent-A-Center's due process theory would revolutionize this Court's role in supervising state-court adjudication of state-law matters. The decision below confirmed New Jersey's prior statutory and case-law. Indeed, the *only* decisions that were reversed were those of the lower courts in this case. A holding that this decision violated Rent-A-Center's due process right to fair notice under these circumstances would create a federal constitutional question in *every* case where a state's highest court decides a question of first impression, no matter how consistent that decision is with statutory and prior lower-court case law. There is no support in this Court's or any other court's precedent for such a sweeping and seemingly boundless expansion of due process. Thus, there also is no split of authority on the question presented that would merit this Court's review.

STATEMENT OF THE CASE

1. The Underlying Causes of Action

In 2002, Respondent Hilda Perez filed this case in the Superior Court of New Jersey, Camden County, after Rent-A-Center had initiated a collection action against her. Pet. App. 8a. Perez alleged that Rent-A-Center's "rent-to-own" contracts for installment purchases of household goods violated New Jersey's Retail Installment Sales Act ("RISA"), N.J. STAT. ANN. §§ 17:16C-1, *et seq.*, and Consumer Fraud Act ("CFA"), N.J. STAT. ANN. §§ 56:8-1, *et seq.*, by charging her interest in excess of the state's 30% usury ceiling that RISA incorporates. Pet. App. 8a. She based her claims on the fact that Rent-A-Center was charging her approximately double the cash price to purchase these goods over time, representing annual interest rates of 80% and higher. *Id.* 5a, 8a. Perez sought relief on behalf of herself and a class of New Jersey consumers who entered into these transactions with Rent-A-Center on or after April 24, 1999. The class dated back to April 24, 1999 because, as discussed below, that is when Rent-A-Center had finalized a $60 million settlement of prior cases in which New Jersey consumers asserted claims identical to those here, and Rent-A-Center twice had summary judgment entered against it.

2. The Prior State of Applicable New Jersey Law, Including Decisions Against Rent-A-Center

When Perez initiated this action in 2002, every New Jersey court that had addressed either or both of the statutory claims she made against Rent-A-Center agreed with her position that (i) New Jersey's RISA applies to rent-to-own contracts; and (ii)

RISA incorporates the state criminal usury statute's 30% ceiling on interest charges.

First, in *Saul v. Midlantic National Bank/South*, 572 A.2d 650 (N.J. Super. Ct. App. Div. 1990), New Jersey's appellate division held that the 30% criminal usury ceiling applies to charges in installment purchase contracts. *Id.* at 652 n.1. The court reached this conclusion despite also finding that state's lower *civil* usury limit did not apply to retail installment sales under RISA (which covers such sales for up to $10,000) or otherwise. *Id.* at 654-56.[1]

The basis for *Saul*'s distinction between these two usury rules is found on the face of the applicable statutes. For retail installment sales, RISA allows parties to contract "in an amount or amounts as agreed to by the retail seller . . . and the buyer." N.J. STAT. ANN. § 17:16C-41. This preempts any application of the civil usury statute where RISA applies. But New Jersey's criminal usury statute is *not* preempted because it contains a savings clause stating that its higher ceiling applies "*notwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction.*" N.J. STAT. ANN. § 2C:21-19(a). These

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[1] Rent-A-Center tries to dismiss the appellate court's statement of law as a mere "suggestion in dicta," (Pet. at 13 n.6), but provides no authority that recognizes a federal due process right to rely on interpretations of state law that are *directly contrary* to a state appellate court's dicta. At the very least, this "suggestion in dicta" put Rent-A-Center on notice that its preferred interpretation of state law was not a sure thing.

preemption and savings provisions were simultaneously enacted into the statutes in 1981. *See* Pet. App. 28a-32a.

Second, following the 1981 amendments to these statutes, in *Green v. Continental Rentals*, 678 A.2d 759 (N.J. Super. Ct., Law Div. 1994), the court held *both* that RISA applies specifically to rent-to-own contracts and that it incorporates the state's 30% criminal usury ceiling. *Green* held that RISA was enacted as remedial legislation meant to "protect consumers from over-reaching by others" and "protect them from over-extending their resources." *Id.* at 764. As such, RISA required the court "to look beyond form to identify the substance of the transaction," so that the customer's ability to acquire ownership meant that the transaction met RISA's definition of an installment sale. *Id.* Having found that these rent-to-own transactions are in fact installment sales, the court held that the difference between an item's cash and installment price was interest that was governed, as in *Saul*, by the state's 30% usury ceiling on interest charges. *Id.* at 766.[2]

Third, following *Green*, similar lawsuits were filed against several rent-to-own companies in New Jersey alleging, among other things, that these transactions were subject to RISA and violated the 30% interest-rate cap. In *Robinson v. Thorn*

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[2] Rent-A-Center tries to dismiss *Green* in footnotes as having "swam against the tide" of New Jersey law. (Pet. 10 n.4). Even if this were true (which it is not), that is no answer to whether the *existence* of this published opinion deciding both of these issues against a rent-to-own company gave Rent-A-Center yet further notice that its preferred interpretation of these laws could be wrong.

Americas, Inc., No. CAM-L-3697-94 (N.J. Super. Ct., Law Div.), the court followed *Green* in granting summary judgment for consumers and against Rent-A-Center (which owned the defendant company) on RISA's application. *See* Pet. App. 87a-91a. *Robinson* held, like *Green*, that rent-to-own transactions are installment sales covered by RISA, *id.*, and entered judgment against Rent-A-Center for RISA violations that resulted in over $100 million in damages. *See* Rent-A-Center, Inc. Form 10-K405/A (April 28, 1999) at 13 (available at http://edgar-online.com/1999/04/28/15/0000950134-99-003298/Section19.asp). Rather than obtaining appellate review of this judgment against it, Rent-A-Center chose to settle these class claims for $48.5 million. *Id.*

At the same time it settled *Robinson*, Rent-A-Center settled, for an additional $11.5 million, two other New Jersey cases where consumers raised identical claims against rent-to-own companies it acquired. *Id.* at 15-16. In one of these cases, *Gallagher v. Crown Leasing Corp.* (cited in *Robinson*, Pet. App. at 86a, 88a), the New Jersey court held, as in *Green*, that the rent-to-own transactions violated RISA and the applicable usury cap. Rent-A-Center Form 10-K at 15. *Gallagher* also granted the plaintiffs summary judgment as to liability on their claim that rent-to-own transactions were subject to the 30% usury limitation. *Id.* Rent-A-Center chose not to appeal these adverse judgments. Instead, it made a business decision to settle all of these cases at a cost of $60 million *and to continue making these high-interest sales in New Jersey despite the state laws that were consistently being held to prohibit them.*[3]

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[3] Rent-A-Center's April 1999 Form 10-K disclosed, in all capital letters, to the company's investors that pending

In sum, at the time Perez filed this action, multiple New Jersey courts had held that rent-to-own transactions (including those involving Rent-A-Center) are retail installment sales governed by RISA and its usury cap on interest charges.

3. The New Jersey Supreme Court's Decision

The New Jersey Supreme Court's decision below echoed these earlier rulings. In holding that RISA applies to rent-to-own transactions, the court focused on the Act's text, history, and underlying purposes. The court found that RISA was enacted in 1960 as "'part of a package of laws designed to protect consumers from overreaching by others, to protect consumers from overextending their own resources and also to promote the availability of financing to purchase various goods and services.'" Pet. App. 18a (quoting *Girard Acceptance Corp. v. Wallace*, 388 A.2d 582 (N.J. 1978)).

As to RISA's coverage, the court highlighted the Act's broad definition of "Retail installment contract" to "include[] a security agreement, chattel mortgage. conditional sales contract, *or other similar instrument* and any contract for the bailment or leasing of goods," where the bailee/lessee "is bound to become, *or has the option of becoming*, the owner of such goods." Pet. App. 19a-22a (emphasis added). The court found

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lawsuits in New Jersey and elsewhere, including *Robinson* and *Gallagher*, "COULD HAVE A MATERIAL ADVERSE EFFECT ON OUR FINANCIAL CONDITION AND OUR BUSINESS OPERATIONS." *Id.* at 10. Thus, Rent-A-Center must have had notice of possible liability under RISA for usury violations since it disclosed that very risk to its investors.

that the phrases "conditional sales," "similar instruments," and "has the option of becoming the owner" were fully descriptive of Rent-A-Center's transactions. *Id.* 21a-22a, 24a-26a.[4] Citing multiple prior New Jersey decisions, the court also found that Rent-A-Center's contracts were "similar in form to transactions that had been judicially recognized as conditional sales" prior to RISA's enactment, and that RISA encompassed through its statutory definition both a "conditional sale" and "any other similar instrument." *Id.* 25a, 26a.

The court further held that any uncertainty should be resolved to find coverage because of the Act's broad remedial purposes. *Id.* 22a-24a. In thus rejecting Rent-A-Center's primary argument that a customer's right to cancel brought these transactions outside the Act's coverage, the court noted that the Minnesota Supreme Court rejected this very argument with regard to that state's retail installment sales statute. *Id.* 26a-27a (quoting *Miller v. Colortyme, Inc.*, 518 N.W.2d 544, 549 (Minn. 1994) (case involving Rent-A-Center subsidiary)).

In finding the state's 30% interest ceiling in its criminal usury statute applicable under RISA, the New Jersey Supreme Court again focused on the plain language and history of these statutes. The court found that its "point of departure is the language of the Act," which uses the terms "interest" and "time price differential" interchangeably, as did the court's own precedent. Pet. App. 28a (citing N.J. STAT. ANN. § 17:16C-41; *Singer Co. v. Gardner*, 323 A.2d 457, 461 (N.J. 1974)). The

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[4] Despite the court's reliance on this exact statutory language, Rent-A-Center chose to omit much of it from its petition to this Court. *Compare* Pet. at 2, *with* Opp. at 2.

court noted that RISA was originally enacted in 1960 with a 10% limitation on the time price differential that could be charged in retail installment sales. Pet. App. 28a. The court also emphasized that when the New Jersey legislature repealed this limitation in 1981, it did not do so in a vacuum. *Id.* 29a. Rather, the legislature simultaneously (1) amended RISA to replace the 10% time-price cap with the current provision allowing interest "in an amount or amounts as agreed to by the retail seller . . . and the buyer;" and (2) amended the state's criminal usury provision to make it applicable "notwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction." *Id.* 29a-30a. Noting that RISA is one of several laws amended on the same day to allow interest rates agreed to by parties, the court held it is subject to the 30% usury ceiling. *Id.* 31a-32a.[5]

Finally, the New Jersey Supreme Court rejected Rent-A-Center's argument that prior New Jersey cases compelled it to differentiate between time price differentials under RISA and interest rates under the criminal usury statute. The court found the pre-1981 cases of *Sliger v. R.H. Macy & Co., Inc.*, 283 A.2d 904 (N.J. 1971), and *Steffenauer v. Mytelka & Rose, Inc.*, 210 A.2d 88 (N.J. Super. Ct., Ch. Div. 1965), inapplicable because they addressed the state's *civil* usury statute and its application to non-RISA contracts. Pet. App. 34a; *see also Sliger*, 283

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[5] The New Jersey Supreme Court's careful analysis of RISA's and the usury statute's text and amendment history should put to rest Rent-A-Center's repeated and increasingly shrill accusations that the court "announced two new rules of law," engaged in "outlandish judicial manipulation," and "radically changed the law of New Jersey." Pet. at 3, 4, 14.

A.2d at 906 (finding civil usury statute inapplicable to revolving credit account, which then fell outside RISA); *Steffenauer*, 210 A.2d at 94 (finding civil usury statute inapplicable to non-RISA commercial sale).[6] The court thus did not overrule these cases, but found them inapposite. The court also noted that *Saul v. Midlantic Nat'l Bank*, the only case Rent-A-Center cited that post-dates the 1981 statutory amendments at issue here, "actually holds that the criminal usury statute is applicable to retail installment sales." Pet. App. 34a (citing *Saul*, 572 A.2d at 652 n.1).

Having determined, purely as a matter of state law, that the state's RISA, Consumer Fraud Act, and 30% usury ceiling apply to Rent-A-Center's rent-to-own contracts, the New Jersey Supreme Court vacated the Appellate Division's judgment for Rent-A-Center and remanded the case to the state trial court "for reinstatement of Perez's complaint and for such further proceedings as are warranted." *Id.* 38a.[7]

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[6] Moreover, contrary to Rent-A-Center's representation that these cases represented a "tide" (Pet. at 10 n.4) of case law on the application of New Jersey's time-price doctrine, *Steffenauer* itself recognized both that this doctrine could be abrogated by the legislature *and that this is precisely what the legislature did in enacting RISA*. 210 A.2d at 93-94.

[7] The court subsequently denied Rent-A-Center's motion for reconsideration. In granting the parties' motions for clarification, the court held that its judgment applied to Perez and anyone who is part of a certified plaintiff class on remand, but is otherwise prospective. Pet. App. 42a, 43a.

REASONS FOR DENYING THE PETITION

I. The Court Lacks Jurisdiction to Review this Interlocutory State-Court Decision.

A. Because Judgment is Not Final, This Court Lacks Jurisdiction Under 28 U.S.C. § 1257.

The Court lacks jurisdiction over Rent-a-Center's petition. This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." 28 U.S.C. § 1257(a). The decision below is not a final judgment or decree. The New Jersey Supreme Court *reversed* a grant of judgment for Rent-A-Center and *remanded* the case "for reinstatement of Perez's complaint and for such further proceedings as are warranted." Pet. App. 38a. Rent-A-Center now has moved the state trial court for summary judgment against Perez on state-law grounds, arguing that the New Jersey Supreme Court's decision "merely reinstated Plaintiff's complaint and left open on remand *any and all defenses to liability that RAC may have*." Rent-A-Center Memorandum to N.J. Superior Court, Camden County, dated Sept. 22, 2006, at 3. Perez has moved for certification of a plaintiff class. Both contested motions are pending in the state trial court, and would be subject to later appeal. Since the decision below reinstating Perez's claims is interlocutory, this Court does not have jurisdiction to review it.

Section 1257(a) establishes a "firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997). This means that a state court's decision must be "final as an effective determination of the litigation and not merely of interlocutory

or intermediate steps therein." *Id.* Section 1257's requirement of finality "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). The New Jersey Supreme Court's decision imposed no liability on Rent-A-Center (and thus deprived it of no property interest). Indeed, Rent-A-Center is now arguing to the state trial court that it is entitled to summary judgment. The decision below is thus interlocutory and non-appealable under § 1257(a).

B. The *Cox Broadcasting* Exceptions to Section 1257's Final Judgment Requirement Do Not Apply.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974), the Court recognized four circumstances that permit review absent a final judgment. The first involves cases where "there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. Second are cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Third are cases where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The final exception arises where (1) "the federal issue has been finally decided in the state courts . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action;" *and* (2) "a refusal immediately to review the state-court

decision might seriously erode federal policy." *Id.* at 482-83. None of these circumstances is present here.

The first three *Cox Broadcasting* exceptions do not apply because there are still disputed issues concerning liability and damages before the state trial court on which either party could prevail, and on which a losing party could appeal. On remand, Rent-A-Center is arguing that it is entitled to judgment on state-law grounds because Perez allegedly did not pay interest in excess of the applicable usury limit. Since the due process question raised here is not "conclusive" in these state court proceedings, and their outcome is not "preordained," *id.* at 479, the first *Cox* exception does not apply. Nor does the second exception apply since, if Rent-A-Center prevails on its pending state-law defenses, the federal-law claim would not "survive and require decision." *Id.* at 480. Likewise, the third *Cox* exception does not apply because there exists no state-law bar to a later appeal by either party, as there is in many criminal cases, *id.* at 481, in the event of an adverse judgment.

Finally, the fourth *Cox* exception is inapplicable here for two reasons. First, a reversal of the state court on Rent-A-Center's federal due process claim would *not* be preclusive of all further litigation, *id.* at 482-83, because Perez asserts claims for injunctive relief that implicate the *prospective* application of the decision below, which Rent-A-Center's due process claim does not challenge. Second, and more fundamentally, this is not a case where "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 483. *Cox* applied this exception where a pending damages judgment involving an unresolved First Amendment question could deter the present exercise of constitutionally protected

speech rights. *Id.* at 485-86. Here, requiring a final state-court judgment poses no such threat to any federal policy. Under the decision below, there is at present no injunction against any conduct by Rent-A-Center. Nor has any liability been imposed against Rent-A-Center that would deprive it of property with or without due process. Moreover, the possibility of a later damages judgment does not affect any *present* exercise of federally-protected rights because Rent-A-Center's federal-law argument does not challenge the decision's *prospective* application. Nor could it, since there is no constitutional right to charge consumers exorbitant interest rates.

In sum, there is no basis in this case to depart from Section 1257's imposition of a "firm final judgment rule." The Court thus lacks jurisdiction, and the petition should be denied.

II. Rent-A-Center Waived Its Federal-Law Argument.

A. This Court Will Not Address Federal Claims Not Properly Raised in the State Courts.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court adheres to the general rule that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" under review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Where a petitioner failed to raise its federal law claim until its petition for rehearing to the state supreme court, the claim is waived. As the Court explained in *Adams*, "we have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Id.* at 89; *see also Board of Directors*

of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987) ("Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal."); *Radio Staton WOW*, 326 U.S. at 128 ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . ."). Since this is precisely what Rent-A-Center did in the state court proceedings below, its belated federal due process argument comes "too late for consideration here."

B. Rent-A-Center's Newfound Due Process Argument is Waived.

Rent-A-Center first argued that a judgment against it would violate the Fourteenth Amendment's Due Process Clause in its petition for rehearing to the New Jersey Supreme Court. Prior to that, its only reference to "due process" was a single sentence in a brief that gave no citation to federal law, and relied exclusively on state-court authority that itself identified no federal law. Because Rent-A-Center did not give the state courts below the required opportunity to consider its federal due process argument raised here, the argument is waived.

Rent-A-Center's federal due process argument was neither addressed by nor properly presented to the New Jersey courts. Nowhere in their opinions or orders did these courts address any due process argument. Where the state's highest court is silent, "the aggrieved party bears the burden of . . . demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented

here.'" *Id.* at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). Rent-A-Center cannot carry this burden.[8]

Prior to its rehearing petition, Rent-A-Center's only mention of "due process" to the New Jersey Supreme Court or Appellate Division (which address the same briefs) was the following:

> Because it is a criminal statute, any ambiguities in N.J.S.A. 2C:21-19 must be construed strictly in favor of those accused of violating the law. *State v. Livingston*, [797 A.2d 153, 158 (N.J. 2002)]. Otherwise, due process rights are violated. *State v. Churchdale Leasing, Inc.*, [557 A.2d 277, 287 (N.J. 1989)].

Pet. App. 93a-94a. Neither Rent-A-Center nor the state court cases it cited in making this argument anywhere identify the U.S. Constitution's Due Process Clause or cases applying it. *See, e.g.*, *Churchdale Leasing*, 557 A.2d at 287 ("At the heart of the rule requiring strict construction of criminal statutes is the principle of due process. *In re Suspension of DeMarco*, [414 A.2d 1339, 1345 (N.J. 1980)]" (which likewise identifies no federal law)).

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[8] Rent-A-Center suggests (Pet. at 14) that the New Jersey Supreme Court implicitly addressed its due process argument by making the ruling prospective as to other parties. Under New Jersey law, however, prospective application of a court's ruling is a matter of discretion that "is not answered by any constitutional mandate." *Fischer v. Canario*, 670 A.2d 516, 521 (N.J. 1996).

Rent-A-Center's passing invocation of "due process" without citing any federal law did not preserve the argument raised here. As the Court found in *Adams v. Robertson*:

> [T]he passing invocations of 'due process' . . . fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution, see Ala. Const., § 13 (1901), and thus they did not meet our minimal requirement that it must be clear that a *federal* claim was presented.

520 U.S. at 89 n.3 (citations omitted) (emphasis in original); *see also Rotary Int'l*, 481 U.S. at 550 n.9 ("This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction . . ."); *Webb v. Webb*, 451 U.S. 493 (1981) (lower court brief referencing "full faith and credit" in one sentence without citation "would not suffice to establish that petitioner's claim was based on the Federal Constitution.").[9]

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[9] The New Jersey courts impose the same requirement of substantive argument to preserve an issue. *South Jersey Catholic School Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary School*, 696 A.2d 709, 721 (N.J. 1997) ("Issues that are raised but are not supported with arguments are deemed waived."). Moreover, although the New Jersey Constitution does not contain an express due process clause, "the right to due process is implicit in [its] Article I, Paragraph I," recognizing "Natural and unalienable rights." *State v.*

Because Rent-A-Center did not timely present its federal due process argument for the New Jersey courts to consider, the argument is waived and the petition should be denied.

III. There is No Split of Authority on the Federal Due Process Question.

Rent-A-Center's argument (Pet. 16-28) that the decision below conflicts with decisions by this and other appellate courts applying the Fourteenth Amendment's Due Process Clause is based on the erroneous assertion that the New Jersey Supreme Court announced "new and unforeseeable rules." The state of the law in New Jersey when this case was filed in 2002 demonstrates that this assertion is baseless. As discussed above, the New Jersey Supreme Court reached its holding that RISA and the state's 30% usury ceiling apply to rent-to-own contracts by construing a 25-year old statutory scheme in light of its text, legislative history, and underlying remedial purposes. In doing so, the court overruled *no precedent*. Instead, it echoed the holdings of *every* lower state court case that previously had addressed these questions. Rent-A-Center itself was a party in interest in several of those cases and, notwithstanding those rulings, made a conscious business decision in 1999 to continue making high-interest rent-to-own sales in New Jersey, including those at issue here. This backdrop demonstrates why Rent-A-Center's claim of a lack of fair warning giving rise to a split of authority on a federal due process question utterly fails.

Feaster, 877 A.2d 229, 238 n.3 (N.J. 2005).

A. The Decision Below is Consistent With This Court's Cases.

1. This Court's Due Process Decisions Do Not Compel a Different Result.

First, the decision below does not conflict with *Bouie v. City of Columbia*, 378 U.S. 347 (1964). *Bouie* held that a state court's construction of a criminal trespass statute in affirming a conviction violated the defendant's due process right of fair warning where this interpretation was "clearly at variance with the statutory language," and "has not the slightest support in prior South Carolina decisions." *Id.* at 356. *Bouie* first found that the state trespass statute's prohibition of "[e]ntry on lands of another after notice prohibiting same," *id.* at 349 n.1, was "admirably narrow and precise." *Id.* at 351. But *Bouie* then found that the state court's interpretation of the statute to apply to the act of *remaining* on lands after being asked to leave violated the criminal defendants' due process right to fair warning because, in the 95 years since it was enacted, "the South Carolina cases construing the statute uniformly emphasized the notice-before-entry requirement, and gave not the slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave." *Id.* at 356-57.

The state of the law in New Jersey prior to the decision below was diametrically opposite that in *Bouie*. New Jersey's civil consumer protection statute governing retail installment sales is worded broadly to apply to "a security agreement, chattel mortgage, conditional sales contract, *or any other similar instrument*," N.J. STAT. ANN. § 17:16C-1(b) (emphasis

added), Rent-A-Center's omission of this language from its petition notwithstanding. This statute's provision allowing charges in amounts agreed to by the parties was enacted in tandem with a provision making the state's criminal usury ceiling applicable "notwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction." N.J. STAT. ANN. § 2C:21-19.

Moreover, unlike in *Bouie*, Rent-A-Center had ample notice that these statutes applied to its rent-to-own contracts because at least four New Jersey courts previously held that these are retail installment sales and/or that the criminal usury ceiling governs such sales. Moreover, as detailed above at 8-9, *Rent-A-Center was a party in interest in several of these cases*, each of which it chose to settle at a considerable cost rather than appeal. This case thus would only be akin to *Bouie* if Mr. Bouie had twice before been charged with trespass for identical conduct, lost and paid fines to settle both of these cases under precedent addressing identical conduct, and only then on the third time around tried to challenge these laws for failing to give him fair notice.

For the same reasons, the decision below does not conflict with *Rogers v. Tennessee*, 532 U.S. 451 (2001). *Rogers upheld* a state court's admittedly retroactive change to a state-law rule imposing criminal liability, and *rejected* a strict application of *ex post facto* rules to the due process limits on state courts as "unworkable." *Id.* at 461. Instead, *Rogers* held that *Bouie* was limited to cases involving "interpretations of criminal statutes . . . that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.* (quoting *Bouie*, 378 U.S. at 354). That is not what occurred

here. The decision below reflects the plain language of the state statutes at issue and echoes the nearly-unanimous view of lower state courts in applying these statutes. Indeed, the *only* opinions that were overturned were those of the lower courts *in this case*. Rent-A-Center's invocation of *Rogers* and *Bouie* thus misses the mark far and wide.

Similarly, *Marks v. United States*, 430 U.S. 188 (1977), addressed a change to First Amendment precedent that "undeniably relaxes" the standards limiting criminal obscenity prosecutions. *Marks* held that this expansion of criminal liability could not be applied retroactively given the "special care" for providing fair warning in the regulation of expression that implicates the First Amendment. *Id.* at 195-96. Here, there was no change in controlling precedent. The New Jersey Supreme Court distinguished all of the prior state court cases Rent-A-Center cites here, without overruling any of them. Moreover, Rent-A-Center's high-interest sales here do not implicate any of the First Amendment concerns that warranted "special care" in *Marks*. These decisions thus do not conflict.

2. The Decision Below Does Not Conflict With This Court's Dicta in *Landgraf*.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the only case Rent-A-Center cites that involves *civil* liability, the Court merely recognized a *presumption* against retroactivity in construing ambiguous statutes. *Id.* at 272. At the same time, *Landgraf* found that "the *constitutional* impediments to retroactive civil legislation are now modest." *Id.* (emphasis in original). This is even more true of state court adjudication. *See, e.g.*, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753

(1995) (a party's claim of reliance, "often present when prior law is overruled - -is the very sort that this Court [has] found insufficient to deny retroactive application of a new legal rule."); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (noting the "freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law."). In any event, *Landgraf* cannot possibly conflict with the decision below because the New Jersey Supreme Court did not announce any new or unforeseeable rule of law.

The decision below thus does not conflict with any of this Court's due process decisions.

B. The Decision Below Does Not Conflict With Any Other Courts' Decisions.

The decision below likewise does not conflict with the lower court cases Rent-A-Center cites. In *Helton v. Fauver*, 930 F.2d 1040 (3d Cir. 1991), the court on *habeas corpus* review addressed a state high court's ex post facto construction of a statute that expanded criminal liability for juveniles after all lower state court cases had rejected this expansion. *Id.* at 1048. *Helton* found this "unforeseeable departure from precedent" to violate due process. *Id.*; *see also id.* at 1047 ("In short, the language of the statute, together with the line of cases interpreting it in the New Jersey state courts, could not have put Helton on notice of, or made reasonably foreseeable, the shift in direction and the change in the law effected by the New Jersey Supreme Court."). Here, in stark contrast, the decision below is consistent with the repeated decisions of the lower New Jersey courts in the *Saul*, *Green*, *Robinson*, and *Gallagher* cases discussed herein. In light of these cases, the decision

below can hardly be called "unforeseeable," and thus does not conflict with *Helton*.

The remaining cases Rent-A-Center cites all involve explicit reversals of precedent that expand the scope of criminal liability. *See Moore v. Wyrick*, 766 F.2d 1253, 1257 (8th Cir. 1985) ("Answering this question in the affirmative, the Missouri Supreme Court explicitly overruled its prior decision in [*State v. Majors* 237 S.W. 486 (Mo. 1922)]); *United States v. Potts*, 528 F.2d 883, 886 (9th Cir. 1975) ("Our decision today, overruling [*United States v. Hoctor*, 487 F.2d 270 (9th Cir. 1973)], undoubtedly expands the scope of potential criminal liability . . ."); *People v. Martinez*, 973 P.2d 512, 521 (Cal. 1999) ("Our overruling of [*People v. Caudillo*, 580 P.2d 274 (Cal. 1978)] raises the further question whether today's holding may be applied retroactively to defendant."). Here, by contrast, the New Jersey Supreme Court imposed no criminal liability on Rent-A-Center and overturned none of its own precedent. This decision thus did not deprive Rent-A-Center of fair warning as to its potential civil liability to New Jersey consumers, and does not conflict with any of the cases cited in Rent-A-Center's petition.

That there is no conflict of authority on the due process question presented is hardly surprising. Rent-A-Center's claim of a lack of fair warning from a state supreme court decision that overturns no precedent and follows every prior lower state court case addressing the precise questions before it would create a bottomless expansion of the concept of due process. A finding that the decision below violates the Fourteenth Amendment would compel the same result in every case where a state court decides a question of first impression. This would

force every state court facing an allegedly novel question of law to issue a prospective advisory opinion, a practice the Constitution arguably *prohibits* for federal courts. *See Harper*, 509 U.S. at 107-08 (Scalia, J. concurring) (it is "'the province and duty of the judicial department to say what the law *is*,' not what the law *shall be*.") (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)). There is no split of authority because the question presented lacks any basis in fact.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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